



December 4, 2000

Ms. Elaine S. Hengen
Assistant City Attorney
City of El Paso
2 Civic Center Plaza
El Paso, Texas 79901-1196

OR2000-4594

Dear Ms. Hengen:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 141786.

The City of El Paso (the "city") received a request for copies of all complaints and their dispositions regarding twenty-three specifically named police officers. In addition, the requestor seeks any audiotapes, transcripts, affidavits, or other type of written statement regarding "offenses committed" in connection with police case number 00-241141. You make no mention of the requested audiotapes and written statements, and therefore, we assume that to the extent they exist in the city's possession, the city intends to release them to the requestor. *See* Gov't Code §§ 552.301, .302. As to the requested complaints and dispositions, you have submitted three pages from a 73-page list of such information, claiming that portions of this submitted information are excepted from disclosure under sections 552.101 and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

As a preliminary matter, we note from the city's arguments that the city has not submitted all of the information it wishes to withhold. You explain that in regard to the requested complaints and dispositions, the city maintains two types of information: 1) a list of complaints and dispositions; and 2) the actual complaint files that correspond with each entry on the list. While the city has submitted a portion of the list for our review, it has not submitted the corresponding complaint files or a representative sample thereof. Consequently, the city must release the responsive complaint files to the requestor. *See* Gov't Code §§ 552.301, .302.

Turning to the submitted information, we begin our analysis with your argument that a portion is confidential under section 552.101 of the Government Code in conjunction with article 55.04 of the Code of Criminal Procedure. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Accordingly, section 552.101 encompasses confidentiality provisions such as those found in Chapter 55 of the Code of Criminal Procedure. Articles 55.01 through 55.05 of the Code of Criminal Procedure provide for the expunction of criminal records in certain limited circumstances. Article 55.01 describes the circumstances in which an individual is entitled to expunction. Article 55.02 describes the procedure whereby an entitled individual may petition for expunction of his criminal records. If the individual is successful in obtaining an expunction order, a copy of the order is sent "to each official or agency or other entity of this state or of any political subdivision of this state named in the order that there is reason to believe has any records or files that are subject to the order." Code Crim. Proc. art. 55.02 § 3(a). Section 5 of article 55.02 directs officials or agencies named in the order to expunge all records or files that are subject to the expunction order.

Article 55.03 provides as follows:

After entry of an expunction order:

- (1) the release, dissemination, or use of the expunged records and files for any purpose is prohibited;
- (2) except as provided in Subdivision 3 of this article, the petitioner may deny the occurrence of the arrest and the existence of the expunction order; and
- (3) the petitioner or any other person, when questioned under oath in a criminal proceeding about the arrest for which the records have been expunged, may state only that the matter in question has been expunged.

Article 55.04 imposes sanctions for violations of an expunction order.

The submitted information contains an entry that references criminal records which you state have been expunged. Based on your representation that the reference contained in the submitted information is subject to the expunction order, we agree that the city must withhold the reference. We have marked the information that must be withheld under section 552.101 in conjunction with article 55.03.

That same entry contains additional information which you argue is confidential under section 552.101 in conjunction with common law privacy. Section 552.101 also protects information coming within the common law right to privacy. *Industrial Found. v. Texas*

Indus. Accident Bd., 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Common law privacy protects information if it is highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, *and* it is of no legitimate concern to the public. *Id.* at 683-85; Open Records Decision No. 611 at 1 (1992). The types of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683. However, common law privacy does not apply to embarrassing or intimate information “unless the records [at issue] are also of no legitimate interest to the public.” Open Records Decision No. 470 at 4 (1987); *see also* Open Records Decision No. 464 (1987). Furthermore, the public has a genuine interest in information concerning a public employee’s job performance and the reasons for dismissal, demotion, or promotion. Open Records Decision No. 444 at 5-6 (1986); *see also* Open Records Decision No. 208 (1978) (disciplinary action against public employee available to public). From what we can glean from the highlighted information contained in entry number 23 on the first page of Exhibit B, the information pertains to a job requirement of a police officer that resulted from that officer’s misconduct. As you have provided no factual background to dispute this reading of the information, we find that this information involves a legitimate public interest. Therefore, the city may not withhold this highlighted information under section 552.101.

You also argue that the highlighted portion of entry number 18 on the second page of Exhibit B falls under common law privacy. However, we find that this information also pertains to a police officer’s job performance and is therefore of legitimate public interest. Therefore, the city may not withhold this information under section 552.101.

The remaining information at issue consists of the highlighted portions of entry number 20, on the first page of Exhibit B, and of entry number 1 on the last page of Exhibit B. You claim that both sets of information are confidential under section 552.117(2) of the Government Code. Subsection 552.117(2) provides for the confidentiality of current and former peace officers’ home addresses, home telephone numbers, social security numbers, and information that reveals the existence of family members. It is not clear from your arguments or from the information itself whether these two entries pertain to criminal or internal investigations. If the named police officers in these entries were subjects of criminal investigations, then section 552.117(2) would not apply to any of the information contained in these entries. If the named police officers were only subject to internal investigations, then the city must withhold the highlighted information under section 552.117(2).

In conclusion, the city must withhold the marked information that references an expunged criminal record under section 552.101 in conjunction with article 55.03 of the Code of Criminal Procedure. In addition, the city must withhold the indicated highlighted

information under section 552.117(2) if the named officers were only the subjects of internal investigations as opposed to criminal investigations. The city must release the rest of the submitted information to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "E. Joanna Fitzgerald". The signature is fluid and cursive, with the first name "E." and last name "Fitzgerald" clearly distinguishable.

E. Joanna Fitzgerald
Assistant Attorney General
Open Records Division

EJF\er

Ref: ID# 141786

Encl: Submitted documents

cc: Mr. Robert S. Huscroft, Sr.
10305 Darin Road
El Paso, Texas 79925
(w/o enclosures)